

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 FUTUREWISE,

4 Petitioner,

5
6 v.

7 THURSTON COUNTY,

8
9 Respondent.

Case No. 09-2-0006

ORDER DENYING MOTION FOR STAY

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12 On June 22, 2009, the Board issued a Final Decision and Order (FDO) in the above-
13 captioned matter. That FDO affirmed the holding set forth within the April 22, 2009
14 Compliance Order in Case No. 05-2-0002, which stated:¹

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16 [R]emoving lands from consideration for designation based on the presence of
17 51% or more wetlands on a parcel was clearly erroneous. Such a consideration
18 was not adopted by the County in its Comprehensive Plan as one of its
19 designation criteria. This matter is remanded to the County to determine if any of
20 the parcels removed from consideration as agricultural lands of long-term
21 commercial significance based upon the presence of 51% or more of wetlands
22 qualify for LTA designation under the County's nine adopted criteria.

23 Thurston County filed an appeal of the Board's June 2009 FDO to Thurston County
24 Superior Court.² That appeal does not challenge the Board's substantive decision; rather,
25 the County alleges the Board erred when it permitted Futurewise to file a new Petition for
26 Review in relationship to an action the County took to achieve compliance in response to
27 the Board's holding in Case No. 05-2-0002.³

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32 ¹ April 2009 Compliance Order, at 15; June 2009 FDO, at 5-6.

² Cause No. 09-2-01747-3.

³ *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002. [1000 Friends is now known as Futurewise].

1 Pursuant to the schedule set forth in the Board's FDO, a compliance hearing was held on
2 August 26, 2009. This hearing was coordinated with the compliance proceedings related to
3 Case No. 05-2-0002. At that hearing, the County moved orally to stay further compliance
4 proceedings in the present case in light of its pending appeal of the FDO to Superior Court.
5 The Board requested that the County file a written motion in order to give Petitioner an
6 adequate opportunity to consider and respond. The County filed its Motion for a Stay on
7 August 28, 2009 and, on that same day, Futurewise filed an Objection to Motion for Stay.⁴
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10 In its motion the County argues that if the Board does not stay the compliance proceedings
11 related to this matter until its appeal of the FDO has been exhausted in the courts, it could
12 preclude the appellate court from reviewing significant and potential precedent setting
13 issues of law.⁵ The County notes that its appeal raises two issues of first impression: 1)
14 when a county has been found noncompliant with the Growth Management Act (GMA) by
15 order of a Hearings Board and the county takes action to comply, is the statutory
16 compliance hearing process the only proper avenue available to the party challenging the
17 compliance action which amended the comprehensive plan; and 2) can a party file
18 duplicative actions regarding the same issue by filing a challenge through the compliance
19 process and filing a new petition.⁶ The County argues that granting a stay would prevent
20 Futurewise from arguing the County's appeal is moot. (The County correctly anticipates that
21 based on the County's compliance efforts, in the absence of a stay, the Board would issue
22 an order finding the County in compliance and close this case.)
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25 In response, Futurewise argues that the issuance of a stay would not prevent it from arguing
26 that the County's appeal is moot.⁷ Futurewise notes that based on the compliance efforts
27 taken by the County, the County has achieved compliance with the GMA in regards to the
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31 ⁴ August 28, 2009 Thurston County's Motion to Stay; August 28, 2009, Futurewise's Objection to Motion for
32 Stay.

⁵ County Motion for Stay at 2.

⁶ Id.

⁷ Futurewise's Objection to Motion for Stay at 1.

1 prior area of non-compliance found in this case, and the County is now seeking an advisory
2 opinion when there is no longer a controversy between the parties.

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4 As Futurewise correctly points out, and the County does not dispute, the issues between the
5 parties in this case were resolved by the County's compliance actions related to Case No.
6 05-2-0002. At the recent compliance hearing in that case, both of the parties acknowledged
7 that the County had achieved compliance on the agricultural lands issue. This was the very
8 same issue presented in Case No. 09-2-0006 and, but for the need to first consider the
9 present motion, the Board was prepared to issue an order of compliance in both cases.
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11 Rather than assert that there remain issues regarding its compliance with the GMA, the
12 County argues that the Board should stay its issuance of a compliance order so that it can
13 obtain a ruling on the applicability of the doctrines of *res judicata* and *collateral estoppel* to
14 compliance proceedings before the Board.
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17 Following the issuance of a FDO finding noncompliance with the GMA, RCW 36.70A.330(2)
18 provides that the Board shall issue a finding of compliance or non-compliance:

19 (2) The board shall conduct a hearing and issue a finding of compliance or
20 noncompliance with the requirements of this chapter and with any compliance
21 schedule established by the board in its final order. (In relevant part)

22 While the Board has granted stays in other cases, it has not done so in a manner that would
23 stay its mandatory duty to rule on GMA compliance. Instead, the Board has done so where
24 it would be wasteful of the local jurisdiction's resources to pursue legislative action to
25 achieve compliance where the matter of GMA compliance is in dispute and under appeal⁸ or
26 when intervening legislation resulted in the inability of a jurisdiction to achieve compliance.⁹
27 Neither of these circumstances is present in the instant case. Here, the parties are in
28 agreement that the County has achieved GMA compliance and the Board's duty, therefore,
29 is to issue an order finding compliance.
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32 ⁸ See, eg. *Adams Cove v. Thurston County*, WWGMHB No. 07-2-0005, Order Granting Stay of Proceedings;
Karpinski, et al v. Clark County, WWGMHB Case No. 072-0027, Order Granting Limited Stay.

⁹ *Swinomish Tribe, et al v. Skagit County*, WWGMHB Case No. 00-2-0012c, Order Granting Stay.

1 For the reasons set forth above, the Board **denies** the County's Motion for a Stay in Case
2 No. 09-2-0006.

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4 So ordered this 3rd day of September, 2009.

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James McNamara, Board Member

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Nina Carter, Board Member

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William Roehl, Board Member

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